Thank You for registering for the three-part Elected Officials’ Webinar Series.

Welcome to Session Three: Freedom of Information Act (FOIA)

Upcoming League Events:
The Medical Marihuana Act & Your Community – February 10
EOA Core Weekender – February 18-19
EOA Advanced Weekender – February 18-19
Essential Skills for the Elected Official – March 10
2011 Capital Conference – April 5-6
FOIA: The Basics of Michigan’s Freedom of Information Act

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Presentation Outline

1. Policy
2. What is covered
3. How to respond
4. Exceptions
5. Cases and court decisions
6. Policy
7. Your questions

*A cautionary note: this presentation is intended to cover the concept of the FOIA and its basic provisions. There is no substitute for consulting with your city or village attorney, who can interpret the law in the context of your community’s particular circumstances and the most recent case law.
Policy of the Act

It is the public policy of this state that all persons, except those incarcerated in state or local correctional facilities, are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees, consistent with this act.

The people shall be informed so that they may fully participate in the democratic process.
What must you provide?

A “public record,” which is: a “writing” which is prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function, from the time it is created.
What is a “writing”?

- paper documents
- e-mail
- voice mail?
- notes or drafts?

- virtually any or all means of recording meaningful content, including writing by any method, photographing, printing, every means of recording, films, microfilm, magnetic or punch cards, discs, drums, etc.
Basic Requirements

- Appoint FOIA Coordinator
- Right to Inspect—the original
- Reasonable Access / Reasonable Protection
- Do not have to create or even compile (computer formats)
- May charge a fee—uniform / actual cost / lowest paid employee (including fringes)
- May not charge for search, unless not to do so would be unreasonable
- Requests must be in writing (fax or e-mail ok)
- You must reply—even if only to say the record does not exist because no action = denial, which has more requirements
Some Public Records Are Exempt from Disclosure Under FOIA

What about the exceptions...

• The decision to withhold a public record from disclosure is discretionary with the public agency. The act authorizes, but does not require, withholding of public records that are exempt.

• The document may be provided even if it is one that is exempt under FOIA—unless it is one that cannot be provided because of another statute, right, or privilege—e.g. attorney-client, Social Welfare Act

• Examples of exceptions: bids (until a bid is selected); test questions / answers; tentative bargaining agreement
Isn’t invasion of privacy an exception?

• Most frequently used exemption to withhold records from disclosure is invasion of privacy.

For this exemption the information must meet a two-part test.
  – First, the information must be of a personal nature
  – Second, the release of the information must constitute a clearly unwarranted invasion of an individual’s privacy.

• “personal” = reveals intimate or embarrassing details of an individual’s private life

NOTE: Personnel records, including salary and performance reviews, are generally not exempt.

Police may be different as well as information regarding medical, counseling, and psychological records and social security numbers.
Exemption: Police Records

Aren’t police records exempt!?

• 2 categories: 1) Investigation records
  2) Personnel records

• In regard to investigation records—very high standard to meet to be exempt from FOIA:
  1) Burden of proof on local government,
  2) Interpret exemption narrowly;
  3) Must separate exempt from non-exempt

• The Michigan Supreme Court held: you must show exactly how disclosure would harm law enforcement proceeding—merely “pending case” or “ongoing investigation” is not sufficient.
Police Personnel Records

- Police Personnel Records
  - Exempt if they deal with internal workings of the police department (e.g. who is an undercover officer).
  - Still subject to balancing test: that is, unless the public interest in non-disclosure outweighs public interest in disclosure . . . They would be subject to FOIA.
  - Must separate exempt material from non-exempt—and release non-exempt.
Today’s and Tomorrow’s Technology

• E-mail clearly falls within the definition of “writing” . . . which brings it within the definition of a “public record”. So . . .

• Any e-mail which “is prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function” would be subject to FOIA.

• Voice mail?

• Computer e-mail from home?
  1) Your personal computer
  2) Computer provided by city or village
Question 1

• The Vice-President of a university wrote a letter to a member of the university’s Board that was critical of the university President?

• The local newspaper, covering a controversial story involving the university President’s use of university funds for the President’s residence, and calls by some for the President to resign, filed a FOIA request for all relevant public records - -

• Should the newspaper get the VP’s letter under FOIA?
The Michigan Supreme Court held the letter was not subject to FOIA....why?
• What is a “frank communication” as defined by the Supreme Court?

  – (1) is a communication or note of an advisory nature made within a public body or between public bodies,

  – (2) that covers other than purely factual material, and

  – (3) is preliminary to a final agency determination of policy or action.
Exception for Frank Communication

• The opinion of the Court:

“We doubt that officials within a public body would offer *candid, written* feedback, or that they would do so for very long, if that feedback would invariably find its way into the public sphere. If the frank communication exemption can never protect a candid communication, which almost assuredly contains unfiltered criticism of policies and people, then we will have rendered this FOIA exemption a nullity.”

• So, it is an exception... but still must meet tough balancing test: the public interest in encouraging frank communication must clearly outweigh public interest in disclosure.

• Be cautious—there were unique circumstances in the EMU case.
Question 2

What if a school system had a policy regarding teachers that stated:

“all data contained on any school computer system is owned by [the school], and may be monitored, intercepted, recorded, read, copied, or captured in any manner by authorized school personnel. . .

“By logging into this system, you acknowledge your consent to these terms and conditions of use”. . . . “Users agree to use this technology only for appropriate educational purposes.”
The policy further stated, “[e] mail is not considered private communication. . . . It may be accessed by others and is subject to subpoena. . . . Users should not expect that their communications on the system are private. . . .”

A FOIA request was made... to get all the e-mail sent to and from 3 teachers (who were involved in a controversial union-school contract negotiation) who used the school computer system for the e-mails. The e-mails were stored in the school’s system.
The trial court held the e-mails were public records, subject to FOIA, because they were “in the possession of, or retained by” the school.

It was argued that “retention of electronic data is an official function where it is required for the operation of an educational institution.”

Should the teachers’ e-mails be subject to FOIA?
Answer 2

• The Court of Appeals held: the e-mails were not subject to FOIA.

• The Michigan Supreme Court denied leave to appeal. (A rehearing has been requested.)

• Why?
The key to the Court of Appeals decision is that use or retention of the document must be “in the performance of an official function.”

“We conclude that under the FOIA statute the . . . personal e-mails were not rendered public records solely because they were captured in the e-mail system’s digital memory.”

“Additionally, we conclude that mere violation of an acceptable use policy barring personal use of the e-mail system – at least one that does not expressly provide that e-mails are subject to FOIA – does not render personal e-mails public records subject to FOIA.”
A beautifully stated rationale for its decision...

“This is difficult question requiring that we apply a statute, whose purpose is to render government transparent, to a technology that did not exist in reality (or even in many people’s imaginations) at the time the statute was enacted and which has the capacity to make “transparent” far more than the drafters of the statute could have dreamed.

When the statute was adopted, personal notes between employees were simply thrown away or taken home and only writings related to the entity’s public function were retained.

Thus, we conclude that the statute was not intended to render all personal e-mails public records simply because they are captured by the computer system’s storage mechanism as a matter of technological convenience.”
“Accelerating communications technology has greatly increased tension between the value of governmental transparency and that of personal privacy. As we stated [at] the outset, the ultimate decision on this important issue must be made by the Legislature and we invite it to consider the question.

However, based on the statute adopted in 1977, the technology that existed at that time and the case law available to us, we conclude that the trial court erred in its conclusion that all e-mails captured in a government e-mail computer storage system, regardless of their purpose, are rendered public records subject to FOIA.”
In a city council chamber the video camera recorder was left on, by mistake, and it recorded some conversations among city staff after the council meeting had adjourned. A copy was sought under FOIA.

Is the video tape subject to FOIA?
Answer 3

• An unpublished COA opinion held that the unedited tape was not a public record “as no official city business was conducted during that time despite the fact that the city retained the unedited tape.”
An unsuccessful bidder on a public project sued the state claiming fraud, and as a part of the action sought production using the FOIA of “the individual notes written by bid reviewing board members concerning the bids.”

The state agency said the notes were personal and not kept in its files.

Were the notes subject to FOIA?
Answer 4

• An unpublished COA opinion held that the notes were public records, were subject to FOIA.

• “... Individual notes taken by a decision-maker on a governmental issue are still public records as they were taken in furtherance of an official function.” (quoting another COA decision)
Question 5

Going back to the case involving the personal e-mails between the 3 teachers... 

What if... the case were about a teacher who is subject to discipline for abusing the policy on the acceptable use of school computers - - and the personal e-mails were used as evidence to support that discipline?

Under these circumstances, would the teachers’ e-mails be subject to FOIA?
The COA decision stated

“... The use of those e-mails would be related to one of the school’s official functions – the discipline of a teacher – and, thus the e-mails would become public records subject to FOIA.”
Subject to FOIA – or not?

So... It is less about *where* something is stored......

than *what* it is and *how* it is used.

How about city and village officials’ e-mail on their home computers? On a city or village-provided computer?

Should you have separate accounts .....one for city/village business and one for personal business?
Conclusion

• When in doubt, consider the policy of the Act

  – Analysis should begin with the presumption that any records requested are subject to disclosure. No records are exempt unless they fit within one of the specific exemptions, which will be narrowly construed.

  – The best policy for a public body is to accept the pro-disclosure intent and language of the act and to respond accordingly.
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